Supreme Court, U.S.
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No. 94-871

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

DORIS MEREDITH
Petitioner

v.

FRANK TRUMAN SCARBOROUGH, WALTIE ELAINE SCARBOROUGH, WILLIE PROCTOR and JOAN PROCTOR
Respondents

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

BRIEF FOR RESPONDENT

W. Phil Eldridge
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QUESTIONS PRESENTED FOR REVIEW

I. Whether an Order of a Trial Court Requiring Petitioner to Return the Natural Flow of Surface Waters from Respondents' Proprerty to its Original and Natural Status Constitutes a Taking Under the Fifth Amendment to the United States Constitution.

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STATEMENT OF THE CASE

The original Order in this case was entered by the trial court on May 31, 1994. The Court granted the injunctive relief requested by the Respondents and ordered Petitioner to return the natural flow of the surface waters from Respondents' property to its original and natural status as it existed before Petitioner cleared her property in 1987 and deposited debris in the former water course causing Respondents' property to flood. At a hearing on Respondents' Motion to Show Cause on May 12, 1992, the court entered its order finding the Petitioner had not removed the debris from the drainage ditch as ordered and has not returned the natural flow of the surface waters to its original and natural state. The court found Petitioner in contempt of court and gave Petitioner 60 days to purge herself by constructing a drainage ditch and further ordering Respondents to construct a drainage ditch across their property, each party to pay costs of construction and further ordering the trial order to be recorded at the Probate office in Geneva County, Alabama in the real property records and that said ditch shall be a permanent easement and shall run with the

property of the parties. The order was signed by Charles L. Woods, Circuit Judge, and dated August 31, 1993. A copy of this order is included as the appendix to the Petition for Writ of Certiorari. On September 30, 1993, Petitioner filed a Motion for New Trial as to the contempt order on August 31, 1993. The lower court denied said motion on October 28, 1993. Petitioner filed a Notice of Appeal to the Alabama Supreme Court on December 7, 1993. (R83). The Alabama Supreme Court entered an order affirming the trial court's decision and afterward overruled Petitioner's Motion for Rehearing. (App., P. 14-15).

SUMMARY OF THE ARGUMENT

This case does not involve a taking. It is settled law that when two adjacent tracts of land belong to different persons, the upper or dominant tract has a natural easement or servitude in the lower for the discharge of all waters falling or accumulating from natural causes on the surface. Any interference with this right by the owner of the lower tract whereby the waters are thrown back upon the upper tract or whereby the natural flow of the waters is obstructed is a private nuisance for which injunction will lie. The trial court ordered Petitioner to restore the natural flow of surface waters from Respondents' property over and across Petitioner's property to its original and natural state. No taking was involved and the Petition for Certiorari is due to be denied.

ARGUMENT

Petitioner, Doris Meredith, contends that the Geneva County trial court's August 31, 1993 Order constitutes a taking under the Fifth Amendment to the U. S. Constitution and Article I, § 23 of the Alabama Constitution of 1901. (Pet. for Cert., P. 6-7) The August 31, 1993 Order required Meredith to construct a drainage ditch and spillway and stated that the ditch shall be permanent easement and shall run with property of the parties. Meredith claims that this Order constituted "a statutory condemnation proceeding." (Pet. for Cert., P. 7) This contention is wholly without merit. "The just compensation and due process clauses are triggered by governmental action." New York N. H. and H. R. Company v. United States, 305 F. Supp. 1049, 1055 (S. D. N. Y. 1969). There was no such governmental action in this case. The Scarboroughs, Respondents, as owners of the dominant tract of land, initiated this action in tort against Meredith, the owner of the lower adjacent tract of land to obtain injunctive relief for a continuing private nuisance to their property caused by Meredith's unlawful obstruction of the natural flow of surface

waters. In Nininger v. Norwood, 72 Ala. 227 (Ala. 1882), the Alabama Supreme Court held that as between adjacent tracts of land "the upper dominant tract has a natural easement or servitude in the lower tract, for the discharge of all waters falling or accumulating from natural causes on the surface; and any interference with this right, or obstruction of it, by the owner of the lower tract ... is a private nuisance which a court of equity will enjoin and abate."

Contrary to Petitioner Meredith's assertion, this action was not a condemnation proceeding. Moreover, the trial court, in fashioning relief for the Respondents Scarborough, was not acting pursuant to statutory condemnation powers. Under Panley Petroleum, Inc. v. United States, 591 F. 2d. 1308, 1326 (C.L. Ct. 1979), *cert.denied*, 444 U. S. 898, 100 S. Ct. 206 (1988), in order to establish a constitutional taking, plaintiffs must show that the officer committing the alleged taking had either express or implied legislative authority to take the property. The relief that the trial court ordered in its August 31, 1993 decree was merely the equitable relief to which the Scarboroughs were entitled as the owners of a dominant tract of land with an equitable servitude in Petitioner Meredith's tract for the natural flow of surface waters. This court ordered remedy is not a governmental action of the variety required for a constitutional taking.

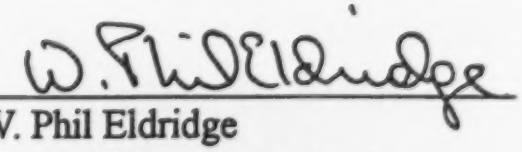
The record shows that Petitioner cleared her property of trees and underbrush in 1987 and put the debris from clearing her land in the old drainage ditch which ran across her property, thus diverting or obstructing the natural flow or drainage of the surface

water and causing the surface waters to be channeled directly onto the property of Respondents. Testimony also showed that Petitioner later built a pond where the ditch was located which also diverted or obstructed the natural flow of drainage of the surface water and caused the water to be channeled onto properties of the Respondents rather than flowing across Petitioner's property as it naturally did. Testimony showed that the flooding of Respondent's property occurred each time it rained. Therefore, the lower court issued a permanent injunction ordering Petitioner to restore the flow or drainage of the surface water over and across her property to its original and natural state before she obstructed or interfered with the flow. Respondents' lands, the upper or dominant tract, had a natural easement or servitude in Petitioner's land, the lower tract, for the discharge of all waters falling or accumulating from natural causes on the surface, the Petitioner could not interfere with or obstruct this easement as she did in the present case. Petitioner admitted in her brief to the Alabama Supreme Court that "Since the civil rule is the governing law in this case, the Defendant takes no issue with the fact that

under this rule, the Plaintiffs have an equitable servitude for the natural drainage of their water over and across her property." The Order of the trial court did not effect a taking of Petitioner's land, and the Petition for Certiorari is due to be denied.

CONCLUSION

Petitioner has absolutely failed to offer any authority in support of her position that the action of the trial court constituted a taking under the Fifth Amendment to the United States Constitution. There was no governmental action in this case. The action was not a condemnation proceeding. The trial court, in fashioning injunctive relief for Respondents Scarborough, was not acting pursuant to statutory condemnation powers. The relief was merely the equitable relief to which the Scarboroughs were entitled as the owners of a dominant tract of land with an equitalbe servitude in the lower tract for the natural flow of surface waters. This court ordered remedy is not a governmental action of the variety necessary for a constitutional taking. The Petition for Certiorari is due to be denied.



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CERTIFICATE OF SERVICE

I hereby certify that I have furnished three copies of the foregoing Response to Petition for Certiorari to J. Earl Smith, Attorney for Petitioner, 128 South Oates Street, Dothan, Alabama 36301, by United States Mail, postage prepaid and properly addressed.

Done this 29th day of November, 1994.

W. Phil Eldridge

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